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### Citations

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

NO. 33

UNITED MINE WORKERS OF AMERICA, DISTRICT 12
*Petitioner*

*v.*

ILLINOIS STATE BAR ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

## MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief *amicus curiae* in the instant case in support of the position of the petitioner, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the petitioner has been obtained. Counsel for respondent has refused his consent.

## INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred twenty-nine affiliated labor organizations with a total membership of approximately thirteen million five hundred thousand. The question presented by the instant case is whether union members may further their undoubted constitutional right to associate for the purpose of preserving and enforcing their legal rights, *Brotherhood of Railroad Trainmen v*

*Virginia*, 377 U. S. 1 (1964), by voting to set up a plan whereby funds in the union treasury may be used to pay an attorney to advise and represent such of their number as need his services. As this case and the *Trainmen's Case* both indicate, union members, affiliated with every segment of the labor movement, have traditionally been anxious to utilize their labor organizations as a base upon which to build improved methods of obtaining legal services, *see, e.g., Committee Report on Group Legal Services*, 39 Cal. S.B.J. 639, 670-675 (1964) (survey of union legal assistance plans in California); New York Times, April 10, 1965, p. 31, col. 2 (discussion of legal aid clinic established by the New York Hotel Trades Council). Moreover, as both these cases also indicate, these efforts have met widespread resistance from both State Bar Associations and the American Bar Association, *see* the Petition for Rehearing in the *Trainmen's Case* filed by the ABA and 44 State Bar Associations. The Bar's efforts have naturally tended to limit the effectiveness and the growth of these union group legal service programs.

The AFL-CIO, as spokesman for the majority of American union members has a profound interest in seeing that the arbitrary and unwise restriction on the access of working men to effective counsel sought by the Bar and granted by the court below is set aside. For this reason it seeks leave to file a brief as *amicus curiae* in order to acquaint the Court with the views of the labor movement as a whole as to why the decision of the court below should be reversed.

## ISSUE NOT COVERED IN THE PETITION

The main portion of the petitioner's brief in the instant case is devoted to demonstrating that the Illinois Supreme Court's determination of the constitutional question presented is erroneous and in conflict with this Court's decisions in the *Trainmen's Case*, and *N.A.A.C.P.* v *Button*, 371 U.S. 415 (1963). It deals only in passing with the seri-

ous consequences that the decision below will have on workers' ability to secure truly adequate legal representation. We believe that recent legal and sociological commentary demonstrates beyond any reasonable doubt that the decision below will have an extremely deleterious effect on their ability to do so, and that it will be helpful to the Court to have the reasons for this belief developed. The accompanying brief *amicus curiae* is therefore primarily addressed to that task.

## CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying brief *amicus curiae* in the instant case in support of the position of the petitioner, just as it granted the AFL-CIO's motion for leave to file a brief as *amicus curiae* in support of the petition for a writ of *certiorari*, 386 U.S. 941 (1967).

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

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UNITED MINE WORKERS OF AMERICA, DISTRICT 12
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*v.*

ILLINOIS STATE BAR ASSOCIATION, ET AL.

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## ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae*.

The opinion below, jurisdiction, questions presented, constitutional and statutory provisions, and canons of ethics involved are set out in Appendix A, pp. 1a-2a, to petitioner's brief.

The interest of the AFL-CIO is set out on pp. iii-iv of the foregoing motion for leave to file a brief as *amicus curiae*.

## ARGUMENT

### PETITIONER'S GROUP LEGAL SERVICE PLAN IS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

1. In 1963 this Court found that a group legal service plan [1] instituted by the National Association for the Advancement of Colored People (N.A.A.C.P.) was entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States, *N.A.A.C.P. v Button,* 371 U.S. 415 (1963). That plan had as its principal aim the "financing [of] litigation aimed at ending racial segregation in the public schools," 371 U.S. at 420. In other words, at the time it was reviewed by this Court, the plan's principal aim was to insure that the rule of law announced in *Brown v Board of Education,* 347 U.S. 483 (1954) became a living reality. The plan's lawyers were elected at the organization's convention and were compensated for their work on a per diem basis by the N.A.A.C.P., which was their sole source of remuneration for working on a case, 371 U.S. at 420. If potential clients came to the N.A.A.C.P., the chairman of the legal staff and the President of the local N.A.A.C.P. Conference would decide whether legal assistance should be given, *Id.* at 421. In addition, at the initiative of local N.A.A.C.P. branches, members of the legal staff would speak to local meetings about the legal steps needed to bring about desegregation. They carried with them printed forms for authorizing the N.A.A.C.P. to represent

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[1] Group legal service plans have been defined as plans in which "Legal services [are] performed by an attorney for a group of individuals who have a common problem or problems, or who have joined together as a means of best bargaining for a predetermined position, or who have voluntarily formed, or become members of an association with the aim that such association shall perform a service to its members in a particular field or activity, or through common interests it appears that the organization can gain a benefit to the members as a whole." *Committee Report on Group Legal Services,* 39 Cal. S.B.J. 639, 661 (1964).

the signees in legal proceedings to achieve that end, *Ibid.* The N.A.A.C.P. set down basic guidelines relating to litigation: for example, that suits seeking separate but equal facilities would not be accepted; but otherwise "the actual conduct of assisted litigation [was] under the control of the attorney," *Id.* at 420-421.

In 1964 this Court, explicitly following and relying on *Button,* held that a group legal service plan instituted by the Brotherhood of Railroad Trainmen, AFL-CIO, was likewise entitled to the protection of the First and Fourteenth Amendments, *Brotherhood of Railroad Trainmen v Virginia,* 377 U.S. 1 (1964). The Trainmen and the other railroad brotherhoods had supported passage of the Federal Employee's Liability Act, 45 U.S.C. Sec. 51-60, and the Trainmen set up a Legal Aid Department to insure that the benefits of that law would not be eroded by "claims adjusters eager to gain a quick and cheap settlement" or by "lawyers either not competent to try these lawsuits . . . or too willing to settle a case for a quick dollar," 377 U.S. at 3-4. Under the plan the Trainmen, through the secretary of the union's local lodge, advised each injured member not to settle his case "without first seeing a lawyer, and that in the Brotherhood's judgment the best lawyer to consult was the counsel selected by it for that area," *Id.* at 4. The union also provided an investigatory staff at its own expense, *Id.* at 4, n. 8. Moreover, because many members followed the union's advice, the lawyers it recommended were often able to accept a lower fee than was normally charged in the area for handling accident claims, Bodle, *Group Legal Services: The Case for BRT,* 12 U.C.L.A. L.Rev. 306, 311-312 (1965).

In 1966, in the instant case, the Supreme Court of the State of Illinois refused to follow the teaching of *Button* and the *Trainmen's Case,* and held that a group legal service plan instituted by the United Mine Workers, District 12, a labor union, was not entitled to the protection of the

First and Fourteenth Amendments (R. 94-105).[2] In 1913 the District 12 Convention had established a legal department to deal with the problems of members injured while at work since their "interests were being juggled and even where not, they were required to pay forty to fifty percent of the amounts recovered in damage suits for attorney's fees" (R. 14). Under this plan a licensed attorney is retained by the Executive Board to represent those of the members who need and desire his services in relation to workmen's compensation matters (R. 17, 31). The members are advised that an attorney is available to handle their claims (R. 15). The attorney's sole compensation for his services is an annual salary plus actual hotel and transportation expenses and secretarial assistance (R. 14-15, 19-20). Any recovery secured goes to the injured worker in its entirety (R. 16, 46). Members are free, without fear of union discipline, to by-pass the plan and secure an outside attorney (R. 14, 19-20). The attorney and the injured members he represents have sole control of the litigation, including the decision whether to settle short of trial. District 12 has made it clear that as to these matters the attorney would not receive "instructions or direction and [would] have no interference from the District, nor from any officer, and your obligation and status will be to and with only the several persons you represent." (R. 20, 45)

2. We submit that District 12's group legal service plan is constitutionally protected in all respects under the principles laid down in *Button* and the *Trainmen's Case.*

The basic rule is set out in *Button,* 371 U.S. at 428, 429, 430:

> ". . . petitioner claims that the [Virginia law] infringes the right of the NAACP *and its members and lawyers* to associate for the purpose of assisting persons who seek legal redress for infringe-

[2] "R" references are to the record as printed for this Court.

ments of their constitutionally guaranteed *and other rights....*"

* * *

"... abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. . . . In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression...."

* * *

"We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity...." (emphasis added)

This Court has made it perfectly clear that this protection is not limited to political expression in any narrow sense of that term, and that it includes group legal action taken to secure or effectuate legal rights of a non-constitutional dimension which are of value to the entire group. In the *Trainmen's Case* it stated, 377 U.S. at 7, 8:

"A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest. Laymen cannot be expected to know how to protect their rights when dealing with practices and carefully counseled adversaries, cf. Gideon v Wain-

wright, 372 US 335. . . . and for them to associate together to help one another to preserve and enforce rights granted them under federal laws cannot be condemned as a threat to legal ethics. . . ."

* * *

"Only last term we had occasion to consider an earlier attempt by Virginia to enjoin the National Association for the Advancement of Colored People from advising prospective litigants to seek the assistance of particular attorneys. In fact, in that case, unlike this one, the attorneys were actually employed by the association which recommended them, and recommendations were made even to nonmembers. NAACP v Button, supra. . . ."

* * *

". . . The Brotherhood's activities fall just as clearly within the protection of the First Amendment. *And the Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP.*" (emphasis added) [3]

We do not see how any other conclusion could have been reached. Litigation by the N.A.A.C.P. to secure the abolition of legal rules mandating segregation of the races in schools is clearly a form of political expression. It is just as clear, as the Court recognized in *Button,* that litigation designed to implement that goal, after it has become the law of the land—in other words to insure that the law is an operative reality and not a dead letter—is a form of political expression. Great moral causes, however, are not the limits of politics. Politics in its most normal sense concerns rules which govern the allocation of the society's re-

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[3] Indeed, the Court, in the *Trainmen's Case,* 377 U.S. at 7, in language which should have guided the court below, since it precisely governs the situation presented in the instant case, added:

". . . It is interesting to note that in Great Britain unions do not simply recommend lawyers to members in need of advice; they retain counsel, paid by the union, to represent members in personal lawsuits, a practice similar to that which we upheld in NAACP v. Button, supra."

sources between contending parties. Viewed properly the question of whether the burden of supporting an injured workman should fall on the workman, in some or all instances, or on his employer, or on society generally is a political question, *see generally* S. Horovitz, Workmen's Compensation 2-10 (1946). Thus group action of a peaceful nature to convince the general public, the federal or state legislatures, or the federal or state courts that a system following the principles of a workman's compensation plan rather than the common law of torts should be the basis for settling this question is a form of political expression, *cf., Eastern R.R. Conference v Noerr Motor Freight,* 365 U.S. 127, 137-138 (1961). Equally, as the *Trainmen's Case* recognizes, once the basic struggle has been successfully waged, peaceful group efforts to insure that the victory is not a promise to the ear broken to the hope is also a form of political expression. *See* P. Zimroth, *Group Legal Services and the Constitution,* 76 Yale L.J. 966, 987-991 (1967).

Naturally this does not mean that a scheme under which a private promoter offers workers legal assistance in workmen's compensation matters at a five percent contingent fee for himself and a ten percent fee for the lawyer involved, in an area where the standard fee is thirty percent, is protected by the First and Fourteenth Amendments. For it is well settled that they do not protect commercial activities as such, *e.g., Valentine v Chrestensen,* 316 U.S. 52 (1942). But it should and does mean that group legal action by the workers themselves, in situations where the interests of the group and the individuals who comprise it coincide, and where the group has no monetary stake in the litigation, is protected. The touchstone is the purpose of the plan in light of the over-all objectives of its sponsors, *Button,* 371 U.S. at 429.

3. Since it is manifest that associational activity subject to the protection of the First and Fourteenth Amendments

is involved here, the burden of proof that must be carried in order to uphold the decision below is a heavy one. The State must advance a "substantial regulatory interest, in the form of substantive evils flowing from the [interdicted] activities which can justify the broad prohibitions which it has imposed," *Id.* at 444. A showing that the state's action found its roots in the power to regulate the legal profession is insufficient, for "a State cannot foreclose the exercise of constitutional rights by mere labels," *Id.* at 429. Therefore, state action restricting the use of group legal service plans must be justified by proof tending to show that the practice which is enjoined is an "oppressive, malicious or avaricious use of the legal process for purely private gain," *Id.* at 443, or a "commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice," *Trainmen's Case,* 377 U.S. at 6. Moreover, this Court's decision in *Button,* 371 U.S. at 441-443 indicates that this burden of proof is not met if all that is shown is that the associational activity in question takes a form in which the beneficiaries of the plan may be said to be acting through a lay intermediary:

> " Objection to the intervention of a lay intermediary, who may control litigation or otherwise interfere with the rendering of legal services in a confidential relationship, also derives from the element of pecuniary gain. Fearful of dangers thought to arise from that element, the courts of several states have sustained regulations aimed at these activities. We intimate no view one way or the other as to the merits of those decisions with respect to the particular arrangements against which they are directed. It is enough that the superficial resemblance in form between those arrangements and that at bar cannot obscure the vital fact that here the entire arrangement employs constitutionally privileged means of expression to secure constitutionally guaranteed civil rights. There has been no showing of a serious danger here

> of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent. This is so partly because no monetary stakes are involved, and so there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor. And the aims and interests of NAACP have not been shown to conflict with those of its members and nonmember Negro litigants; compare National Asso. for Advancement of Colored People v Alabama, 347 US 449, 459. . . . '[the NAACP] and its members are in every practical sense identical. The Association . . . is but the medium through which its individual members seek to make more effective the expression of their own views'."

In the instant case the heavy burden of proof necessary to sustain the restrictive ruling of the court below has not, and could not, be carried.

The strength of the case for group legal service plans which embody a cost spreading principle appears to us to be overwhelming. First, it is now beyond dispute, by reason of the work of distinguished scholars over the past thirty years that in our rapidly changing complex, interdependent urban society, working men and their families are encountering an ever wider variety of problems which the general polity has dealt with through formal regulation and which may therefore appropriately be denominated as "legal problems"; and that because of the present structure of the American Bar, as governed by the prevailing canons and rules, in many cases the average worker is not being apprised of his legal rights in such fields as landlord and tenant, consumer credit and family law, as well as workmen's compensation, and is not being afforded an adequate opportunity to secure the services of a lawyer in whom he has confidence and who is competent to meet his particu-

lar needs at a price he can afford to pay.[4] *See, e.g.*, M. Schwartz, *Foreword: Group Legal Services in Perspective*, 12 U.C.L.A. L. Rev. 279, 286-295 (1965); J. Carlin and J. Howard, *Legal Representation and Class Justice*, 12 U.C.L.A. L. Rev. 381, 386-423 (1965), (collecting and analyzing earlier authorities); *Committee Report on Group Legal Services*, 39 Cal. S. B.J. 639, 652-660 (1964), (collecting and analyzing earlier authorities); E. Cheatham, *A Lawyer When Needed: Legal Services for the Middle Classes*, 63 Colum. L. Rev. 973 (1963); E. Koos, The Family and the Law (1949); Iowa State Bar Association, Lay Opinion of Iowa Lawyers (1949); C. Clark and E. Corstvet, *The Lawyer and the Public: An A. A. L. S. Survey*, 47 Yale L.J. 1272 (1938); K. Llewellyn, *The Bar's Troubles, and Poultices—And Cures?*, 5 Law and Contemp. Prob. 104 (1938).

As the *Committee Report on Group Legal Services, supra*, 39 Cal. S. B.J. at 652, 659 stated, after analyzing the relevant data:

> "We are persuaded that there is an unfilled public need for legal services; that the public from time to time is confronted with problems for which legal assistance would be on any standard highly desirable but where legal assistance is not obtained."
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> • • • •
>
> "Three indices tend to confirm that the public is not presently being adequately serviced by the legal profession. The growth of unauthorized practice (lay competition) has been a response to a growing need for legal assistance; a need not being met by lawyers. Specialization has been mentioned as a partial remedy but, . . . the bar has been reluctant to accept the stringent safeguards in a certification system that must be innovated in order to make specialization an effective device. Prior sur-

[4] For a discussion pinpointing some of the weaknesses in the present system, by the then chairman of the American Bar Association's Committee on Evaluation of Ethical Standards, *see* E. Wright, *An Evaluation of the Canons of Professional Ethics*, 21 The Record 581 (1966).

veys of the public have reported a substantial need for legal services."

Even the organized Bar, which has fought the establishment of group legal service plans, shows signs of recognizing the magitude of the problem. Thus ABA President Orison S. Marden, in his annual report on the progress of the organized Bar, admitted "We have not yet devised satisfactory plans for serving the great mass of middle income citizens for whom legal services do not appear to be readily available today." Washington Post, August 8, 1967, p. 6, col. 6.

Second, and of equal importance, as far as the problem presented here is concerned, there is growing recognition that well-to-do individuals, and institutions such as the government and corporations, receive a qualitatively different kind of legal service than the average working man. Messrs. Carlin and Howard of the Center for the Study of Law and Society of the University of California, Berkeley, state:

> "Lawyers representing lower-class persons tend to be the least competent members of the bar, and those least likely to employ a high level or wide range of technical skills."
>
> "In the highly stratified professional community of the metropolitan bar, for example, the large firms serving wealthy individuals and large corporations claim a lion's share of the best legal talent. . . ."
>
> "Lawyers available to lower-class clients are not only less competent, but whatever legal talents they have are less likely to be employed in handling matters for their poorer clients. In part this is a direct consequence of the fee. Thus, Hubert O'Gorman [*Lawyers and Matrimonial Cases* 61 (1963)] reports that among matrimonial lawyers in New York City (practically all of whom are individual practitioners or in small firms) the size of the fee

has considerable impact on the quality of service provided. Not only is the amount of time spent on legal research 'conditioned by the anticipated compensation,' but fees may also 'dictate the strategy and tactics employed in legal representation'."

• • •

"The quality of service rendered poorer clients is also affected by the non-repeating character of the matters they typically bring to lawyers (such as divorce, criminal, personal injury): this combined with the small fees encourages a mass processing of cases.... Moreover, there is ordinarily no desire to go much beyond the case as the client presents it, and such cases are only accepted when there is a clear-cut cause of action...."

"A final significant fact about quality of representation is that lower-class clients are most likely to be provided with remedial service only. If a poor person gets to a lawyer it is generally after the fact—after he has been arrested, after his wages have been garnished, or after his property has been repossessed.

"... In [contrast in] representing [well-to-do] clients lawyers provide a much wider range of services and they are of a more continuous and preventive nature. Such services include: (1) planning and setting up legal arrangements by establishing contractual relationships to effectuate the client's wishes and to insure certain legal advantages, and (2) clarifying and fashioning the law to provide maximum protection of the client's interests by means of lobbying in legislative and administrative agencies, and by presenting carefully worked out legal arguments before various official bodies, including appellate tribunals." Carlin and Howard, *supra*, 12 U.C.L.A. L. Rev. at 384-385 (footnotes omitted.)

Third, the scholars who have studied the problem are in general agreement as to the causes of the comparatively inadequate representation available to the typical working

man. *See* authorities cited on p. 10, *supra*. These causes have been succinctly summarized by the former Solicitor General, Professor Archibald Cox:

> ". . . [T]he unfilled need for legal services would seem to center about two difficulties which it may be impossible to overcome without changes in the organization, or structure, of the legal profession and, incidentally, in some of the canons of ethics."
>
> "The first difficulty is the inability of individuals to meet the high cost of the legal services that they occasionally require. It is not that fees are too high. Rendering skilled advice requires time and training that deserve adequate compensation. The cost of maintaining law offices is constantly rising. Litigation, especially where investigatory work is necessary, is expensive at best. Paying even modest legal fees puts an almost unbearable burden not only upon the poverty-stricken who obviously cannot bear the cost but also upon millions in low and middle income groups, unless the case happens to be one in which the potential recovery is large enough to merit a contingent fee. With the low and middle income groups the financial problem is not much different from that of hospital or surgical costs, which overwhelmed family after family before the days of group insurance; the need arises suddenly, the cost is disproportionate to income and no savings have been accumulated against the contingency. This economic segment of society taken as a class, however, can afford to, and should therefore, pay for legal services if some way can be found of spreading and sharing the costs. Indeed, the devising of acceptable methods would seem to offer many advantages for the profession."
>
> "Second, and possibly more important, is the problem of ignorance. The ignorance is of two kinds; first, ignorance of the possibility that legal advice might be helpful and legal remedies may be available; second, distrust of strange lawyers and ignorance as to whether and where reliable legal services can be obtained either without cost or within

the limited ability to pay. . .," A. Cox, *Poverty and the Legal Profession,* 54 Ill. B.J. 12, 14-15 (1965).

Fourth, there is a consensus among independent scholars who have studied this problem that group service plans tend to remove the barriers to adequate legal representation noted by Professor Cox. As Professor Murray A. Schwartz, of the U.C.L.A. Law School, and a member of the Group Legal Service Committee of the California State Bar, has noted:

> "These group plans tend to perform at least one of three separate functions which can be characterized as public awareness, contacting and economic."
>
> "The *public awareness* function is the utilization of the group to apprise the members of their legal rights and of the general availability of lawyers to vindicate those rights. . . ."
>
> "The *contacting* function is the bringing together of the client and a particular lawyer. . . ."
>
> "The *economic* function relates to the pricing of legal services. A group may affect the price of legal services which any one client pays in two ways. The first is by adoption of an insurance principle, spreading the cost over a large number of potential clients (i.e. the members of the group), so that the financial burden of the individual legal service which might otherwise fall on one member is borne by all. All members of the group who are equally likely to be subject to the cost, but those who do not happen to be will, nonetheless, share it. The second way is by increasing the volume of particular kinds of legal services so as to render the handling of any one instance more efficient and thus less costly," Schwartz, *supra,* 12 U.C.L.A. L. Rev. at 285-286.

Finally, there is no presently available operative alternative method, consistent with the Bar's canons of ethics as

presently interpreted, for assuring equal access to the courts to the average working man.[5] The alternative most often mentioned by the Bar is the Lawyer Referral Service, see the Petition for Rehearing, filed by the ABA, pp. 6-7, 10, in the *Trainmen's Case,* but this program does not even purport to make available an insurance or cost-spreading principle. Moreover, the limitations of this service are suggested by the 1962 data as to the Bar's support of the plan, which indicates that only 16,000 of the 300,000 practicing lawyers in the country participated, Schwartz, *supra,* 12 U.C.L.A. L. Rev. at 288, and by the evidence which indicates that potential clients prefer the recommendations of organized groups to which they belong rather than relying on chance or the assistance of third parties with whom they are not familiar, *Committee Report on Group Legal Services, supra,* 39 Cal. S.B.J. at 665, 672. As Theodore Voorhees, Director of the National Legal Aid and Defender Association, and a former ABA officer, recently noted:

> "Each referral service is now operated out of a single downtown office by the Bar Association. Usually the association 'neither vouches for the competency' of lawyers available 'nor for the quality of their services'. According to a report of an ABA Committee headed by Voorhees, 'the client finds himself in a grab bag with no guarantee—or even significant chance—of obtaining an attorney with any special training for his particular problem'." Washington Post, August 7, 1967, p. 1, col. 1, p. 11, col. 1.

The other logical alternative is prepaid legal insurance open to any one qualified to buy a policy. However, as the *Committee Report on Group Legal Services, supra,* 39 Cal. S.B.J. at 720 succinctly noted:

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[5] Government financing is a possible answer, but the funds presently committed to the pressing legal problems of the indigent are limited. We, therefore, exclude it as a possible solution here. *See generally, Neighborhood Law Offices: The New Wave in Legal Services,* 80 Harv. L. Rev. 805 (1967).

> ". . . [T]hree articles are about the only written expressions in the area of prepaid legal insurance. Each article stresses how little is known of the need for such insurance. . . ."
>
> "This Committee has actively debated and considered the subject of prepaid legal insurance. Actuarial studies are badly needed if any such insurance plans can be successful. Through its secretary and members, this Committee has corresponded with and spoken to many experts in the insurance and actuarial fields."
>
> "The response of those in the insurance field was uniform; it was decidedly unenthusiastic. No insurance company has been found which was interested in either the development or sale of such a plan."

In light of the points just noted it appears absolutely clear to us that the Illinois Supreme Court's prohibition (R. 97-102) of group legal service plans set up by labor unions, which embody an insurance or cost-spreading principle, seriously undermines the efforts of working men to provide themselves with effective legal assistance. It destroys the major economic advantages of such plans by requiring each individual to meet the financial difficulties caused by a pressing legal problem entirely on his own. In many situations, as Prof. Cox points out, p. 13, *supra*, this means that the individual in question will be entirely barred from access to the courts. Moreover, it makes it extremely unlikely that the members of the group will benefit from preventive legal planning and long range attempts to influence the course of the law. On the other hand, these legal advantages are available to well-to-do individuals, and to institutions, since they are in a position to retain an attorney who they know has specialized competence in their area of interest, *see* pp. 11-12, *supra*.

In short the instant decision works a very substantial infringement on First and Fourteenth Amendment rights. Thus, as we have pointed out above, pp. 7-9 *supra*, the de-

cisions of this Court in *Button* and the *Trainmen's Case* require an affirmative showing of the "substantive evils flowing" from such plans. No such showing has been, or indeed can be, made here. The court below justified the infringement on personal rights which it mandated by arguing that group legal services constitute a possible threat to the attorney-client relationship brought about by potential conflicts between the individual member's interest and that of the group (R. 101-102). With all due respect, we submit that under this Court's decision in *Button* this argument is untenable.

First, as in *Button,* it seems extremely unlikely that there is any appreciable danger that an attorney employed by a union to handle workmen's compensation claims will attempt to sacrifice the interest of a voting member of the group to further that of the association. As to this matter, the interest of the individual and the group coincide. Neither the union nor the attorney has a financial stake in the individual lawsuits. Both have the sole interest of satisfying each individual member who uses the plan. For the members of the group will continue to assess themselves to pay his fee only if they are convinced that the attorney they employ has their individual interests at heart and that they will be well served by the plan when they make use of it. It is unlikely that they would vote to continue it if they had reason to believe that the personal interests of the individuals who support the plan, including themselves, were being submerged. Thus the fears voiced by the Illinois Supreme Court have been widely recognized to be unwarranted, e.g., H. Weihofen, *Practice of Law by Non-Pecuniary Corporations: A Social Utility,* 2 U. Chi. L. Rev. 119 (1934); *Practice of Law by Lay Organizations Providing the Services of Attorneys,* 72 Harv. L. Rev. 1334, 1344 (1959); *Group Legal Services,* 79 Harv. L. Rev. 416, 420

(1965). Zimroth, *supra*, 76 Yale L.J. at 977.[6] Second, District 12 has taken extensive precautions to safeguard the attorney-client relationship and to insure that the individual member has control of his law suit. The Union has made it clear that it will not take part in litigation decisions. For this reason there was no record evidence tending to show that the interests of a single member had ever been sacrificed in the fifty years of experience under this plan. Significantly, the complainant here is the Illinois Bar Association, not a member of District 12. In the face of this record the unfounded suspicions of the court below are not a sufficient predicate for an infringement upon First and Fourteenth Amendment rights.

In essence, the Illinois Supreme Court concluded that personal payment of the attorney's fee by the client is the *sine qua non* of a proper and ethical attorney-client relationship. The fact that the court below excepted legal aid for indigents from the ambit of its ruling (R. 101-102) indicates the error inherent in this conclusion. For similar needs deserve similar responses, and the problems of the indigent and the average working man in securing assured access to the courts are, in fact, similar. Recognizing the validity of this point Theodore Voorhees, Director of the Legal Aid and Defender Association, has suggested extending legal aid to the millions "who can afford to pay fees but not very large ones." Citizens "of moderate means" outnumber the very poor by 2 to 1, Voorhees said, and "have legal prob-

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[6] Mr. Zimroth states:

> ". . . Generally, we assume that a lawyer is an advocate, serving no interest but his client's. If a lawyer in a law firm is defending an antitrust suit for a small client, we do not normally suspect that he is subverting this client's interest in order to create a precedent favorable to the firm's bigger clients. If an independent lawyer is a member of SNCC, or believes in its goals, or perhaps even is paid to do some of its tax work, we do not think that in defending a Negro in an assigned criminal case he will press SNCC's favorite legal theories rather than the ones most beneficial to his client."
>
> "So far these assumptions about the lawyer's sense of responsibility have worked reasonably well. When they don't, dissatisfied clients may provide a means for detection. There is no reason to make different assumptions about lawyers working for group legal services. . . ."

lems closely akin to the poor. They have domestic difficulties, landlord problems, consumer claims, and debts. They do not number lawyers among their acquaintances, do not know how to find them, and fear their charges." Washington Post, August 7, 1967, p. 1, col. 1. Indeed, as we have attempted to show, while the financial problems encountered by the average working man or an indigent seeking legal redress are similar, the solution to the former's problems may well be far simpler. Society must provide resources to the indigent; the worker on the other hand needs only the freedom to join with others in meeting common problems.

In summary, we submit that the reasoning of the decision below is flatly inconsisent with that of this Court's decisions in the *Trainmen's Case* and in *Button*. There is no logical train of thought to support the conclusion that District 12's plan gives group interests greater scope to prevail over individual interests than does the Trainmen's plan, nor is there a single meaningful distinction between this plan and the plan upheld in *Button*. Thus, the Illinois Supreme Court failed to give adequate weight to the fact that this Court had already considered possible conflicts between the individual and the group and found them insufficient to overcome the constitutional rights of workers "to associate together to help one another to preserve and enforce [their] rights . . . ," *Trainmen's Case*, 377 U.S. at 7.

## CONCLUSION

For the foregoing reasons, as well as those stated by the petitioner, the decision of the Supreme Court of the State of Illinois should be reversed.

Respectfully submitted,

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